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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TIMOTHY KEATING et al.,

Plaintiffs and Respondents,

v.

SAN DIEGO CIVIL SERVICE
COMMISSION et al.,

Defendants and Appellants.

D037773

(Super. Ct. No. GIC749760)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Hayes, Judge. Affirmed.

The City of San Diego (City) and the San Diego Civil Service Commission (Commission, collectively the City) appeal a judgment granting a writ of mandate to provide an administrative appeal before the Commission, pursuant to the Public Safety Officers Procedural Bill of Rights Act, Gov. Code¹ 3304, subdivision (b), to San Diego

¹ All further statutory references will be to the Government Code unless otherwise specified.

police officers Timothy Keating and Robert Wills. The City contends (1) the court erred when it found that the city manager's publication of a report of the Citizen's Review Board on Police Practices (CRB) is a punitive action under section 3303; and (2) the Commission is not the appropriate body to provide an administrative appeal. Keating, Wills and the San Diego Police Officers Association (Petitioners) moved for sanctions against the City for pursuing a frivolous appeal. We affirm the court's decision and deny the motion for sanctions.

FACTUAL AND PROCEDURAL BACKGROUND

Keating and Wills fatally shot Adolphus Demetrius DuBose, a former professional football player, on July 24, 1999. The shooting attracted considerable publicity, resulting in protests and condemnation of the officers as racists. The San Diego Police Department and the San Diego County District Attorney each conducted investigations. The San Diego Police Department determined Keating's and Wills's actions were within the departmental policy on use of force. The district attorney determined Keating and Wills acted reasonably and the shooting was legally justified. In December 1999, the district attorney placed materials collected during the investigation on the internet.

The CRB, a board created by the San Diego City Charter (Charter), also reviewed the incident. (Charter, § 43, subd. (d).) As to the question of racism, which was of significant concern to the San Diego community, the report was ambiguous: "At no time did we find any indication that race was a factor in the events that occurred, other than the erroneous perception that might result whenever a confrontation occurs between members of two different ethnic groups." The comments portion of the report states the

following: "While the Officers conducted themselves within the bounds of existing policy regarding detainment, they did not exercise sufficient discretion within this policy.

[¶] While it is recognized that Mr. Dubose was clearly under the influence of drugs or alcohol, he was not resisting the Officers' inquiries, was calm and not resisting their commands. He only resisted when he was instructed to comply with handcuffing after being told he was not in any trouble. [¶] The officers still had time to evaluate the situation. They were initially called to a "hot prowl", but when they arrived Mr. Dubose was there with other people, including the caller. The Officers acknowledged in their statements that this was obviously not a "hot prowl" and required some clarification. After their initial questioning of Mr. Dubose, there appear to have been three options available to the Officers: [¶] 1. One of them could leave the discussion to investigate the house which would leave the other officer with the suspect. [¶] 2. Continue their conversation and wait for the second unit, then make a decision on their next move. [¶] 3. Handcuff the suspect and apparently one Officer would then investigate the house. [¶] Officers chose the latter though there was no physical provocation by Mr. Dubose. From the Officers' perception, the potential for trouble existed which motivated their action, which is the crux of whether good judgement was used in this case."

The CRB sent the report to San Diego City Manager Michael Uberuaga, who made it public on May 3, 2000. The San Diego Union-Tribune covered the report under the headline, "Panel suggests officers erred in DuBose shooting." The story began as follows: "A report by a civilian watchdog group questions the judgment of two San

Diego police officers who fatally shot former NFL player Demetrius DuBose and urges a thorough review of detainment and control policies."

On May 5, 2000, Petitioners requested an appeal of the report before the Commission. On June 8, the Commission denied the request. On June 13, Petitioners filed a verified petition for writ of mandamus and complaint for declaratory relief. On February 9, 2001, the court took the matter under submission and stated it would not entertain oral argument. On February 23, the court granted Petitioners' motion, finding the publication of the report was a punitive action under section 3033, and ordered an administrative appeal before the Commission. On March 21, 2001, the court issued the writ of mandamus.

DISCUSSION

" 'In reviewing the trial court's ruling on a writ of mandate (Code Civ. Proc., § 1085), the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. [Citation.] However, the appellate court may make its own determination when the case involves resolution of questions of law where the facts are undisputed. [Citation.]' [Citation.]" (*Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1217 (*Caloca*).) Insofar as this case concerns the effect of the CRB's findings against Keating and Wills, the facts are undisputed.

I. *Punitive Action*

The City contends the publication of the CRB report was not a punitive action because it found Keating and Wills acted in conformance with department policy and

because the publication of the report reflected positively on the officers' actions. We disagree.

As we explained in *Caloca*, " '[T]he Public Safety Officers Procedural Bill of Rights Act provides a catalogue of basic rights and protections which must be afforded all peace officers by the public entities which employ them. [Citation.]' [Citation.] [¶] One such basic protection is that the employing public entity must provide public safety officers the right to an administrative appeal of punitive actions. 'No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken *by any public agency . . .* without providing the public safety officer with an opportunity for administrative appeal.' (Gov. Code, § 3304, subd. (b), italics added.) For purposes of the Public Safety Officers Procedural Bill of Rights Act, punitive action is 'any action that *may lead to* dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.' (Gov. Code, § 3303, italics added.)" (*Caloca*, *supra*, 72 Cal.App.4th at p. 1220, italics in original, footnotes omitted.) Punitive actions are those that "*may lead to adverse employment consequences[;]* [t]he statute does not require a showing an adverse employment consequence has occurred or is likely to occur" (*Id.* at p. 1223, italics added.)

In *Caloca*, we held punitive action was taken against deputy sheriffs when the Citizens Law Enforcement Review Board (CLERB), an agency that investigates and makes recommendations concerning citizen complaints against San Diego County deputy sheriffs, issued a report that found the deputies had committed misconduct. (*Id.* at pp.1212, 1223.) The human resource officer of the sheriff's department declared that a

report of misconduct published by a credible agency could have an adverse impact on a deputy's ability to be promoted within the department, even if the department itself had found no misconduct. (*Id.* at p.1221.) We stated, "Because CLERB was specifically created to investigate and make recommendations concerning public complaints about peace officers, it is unrealistic and inappropriate to conclude CLERB reports -- whether positive or negative -- would play no role in personnel decisions. [Citation.]" (*Id.* at p. 1222.)

We reject the City's contention that the CRB report did not make an adverse finding because it stated Keating and Wills acted within policy. The CRB report stated that the officers "did not exercise sufficient discretion within this policy." It found that the officers' decision to handcuff DuBois, who was "calm and not resisting their commands," led to the resulting escalation of violence "because [DuBois] only resisted when he was instructed to comply with handcuffing" By implication, the report blamed DuBois's death on the officers' lapse of discretion and good judgment.

We also reject the City's characterization of punitive actions as requiring more serious criticism than that directed at Keating and Wills. The City has cobbled together disparate facts from various cases and concludes punitive actions require " 'sufficiently severe' reprimands, actual findings of 'misconduct' or 'violations of policy and serious errors in judgment,' and often are accompanied by a specific threat of discipline, or even actual restrictions on the officer's conduct as a result of this criticism" (See *Otto v. Los Angeles United School Dist.* (2001) 89 Cal.App.4th 985; *Gordon v. Horsley* (2001) 86 Cal.App.4th 336; *Caloca, supra*, 72 Cal.App.4th 1209; *Hopson v. City of Los Angeles*

(1983) 139 Cal.App.3d 347, 352-353.)² The City's characterization of punitive actions ignores this court's ruling that punitive actions are those that "may lead" to adverse employment consequences. (*Caloca, supra*, 72 Cal.App.4th at p. 1223; see also *Otto, supra*, 89 Cal.App.4th at p. 997.)

The CRB report may have an adverse effect on the officers' careers. Former San Diego Police Chief Jerry Sanders, who was the final decision-maker on all departmental personnel decisions, declared he considered input from the CRB when making personnel decisions: "Even when I disagreed with the conclusions of the CRB, I always gave weight to their recommendations in making policy and *personnel* decisions." (Italics added.) Because of the department's strong institutional commitment to community support, Sanders expected the current police department administration seriously considers CRB reports when making policy and personnel decisions. Sanders further declared that had he been police chief when this particular CRB report was issued, he would have considered the report when making personnel decisions.

The San Diego Police Department carefully considers CRB reports when making personnel decisions. It would be unreasonable to assume that a report that questions an

² For example, the City mischaracterizes the holding of *Hopson* to require serious errors of judgment that violate policy. That court merely stated the placement of a particular report in officers' personnel files was a punitive action because "there would be ramifications for the career opportunities of the officers." (139 Cal.App.3d at p. 352.) In a footnote that quotes the police chief's testimony, the police chief characterized the officers' actions as "out of policy." (*Id.* at pp. 352-353, fn. 2.) The police chief also testified about another shooting that seriously harmed an officer's career, even though the shooting was accidental and, by implication, did not violate policy. (*Ibid.*)

officer's discretion and good judgment will not impede that officer's career. Further, a lapse of discretion and judgment that not only causes a fatality but also leads to public outrage is one that "may lead" to adverse employment consequences.

We further reject the City's contention that the publication of the CRB report "should have been a relief to the Officers" because it found their actions within policy even though it criticized their judgment. The City states that until publication of the CRB report, there was no information from which the public could conclude the officers' actions were within policy. We disagree. In November 1999, six months prior to the publication of the CRB report, the District Attorney made the results of his investigation available to the public on the internet. That investigation, according to the San Diego Union-Tribune, "concluded that the officers' actions were justified because of the aggressive threat posed by DuBose." In contrast, the San Diego Union-Tribune article on the CRB report was entitled "Panel suggests officers erred in DuBose shooting." The press perceived the CRB report as much less favorable to the officers than the District Attorney's investigation. Additionally, a report placed in the public arena has much more impact than one merely placed in an officer's personnel file. (*Caloca, supra*, 72 Cal.App.4th at p. 1222.) Therefore, by publicizing the CRB report, the City increased the likelihood the report would negatively impact the officers' careers. The court correctly found that the publication of the CRB report was a punitive action pursuant to section 3303.

II. *Appropriate Body to Conduct the Appeal*

Because the publication of the CRB report was a punitive action, the City must provide Keating and Wills with an opportunity for an administrative appeal of the CRB's findings against them. Section 3304 does not outline a procedure for the appeal; the procedural details are to be formulated by the local agency. (*Caloca, supra*, 72 Cal.App.4th at p. 1223.) The City contends the city manager, and not the Commission, should conduct the appeal. We disagree.

We first reject the City's contention that the Commission's hearing of the appeal would violate the Charter. Under the Charter, the Commission supervises "the selection, promotion and removal" of all City employees. (Charter, art. VII, § 115.) The Commission holds public hearings on appeals of terminations, suspensions and layoffs. (Charter, art. VII, § 129.) The city council may confer upon the Commission "further rights, duties, and privileges as may be necessary adequately to enforce and carry out the principles of Civil Service not in conflict with this Charter." (Charter, art. VII, § 139.)

The Charter further provides that the city manger has "the exclusive authority to create and establish a citizens' review board." (Charter, art. V, § 43, *italics added*.) The city manager "establish[es] such rules and regulations as may be necessary for this board to carry out its functions; provided however, that such rules and regulations shall be consistent with the laws of the State of California concerning citizens' complaints against peace officers." (*Ibid.*)

A city charter is the "supreme law of the [c]ity, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law." (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 170 (*Domar Electric*)). " '[B]y accepting the privilege of autonomous rule the city has all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter.' [Citations.] Charter provisions are construed in favor of the exercise of the power over municipal affairs and 'against the existence of any limitation or restriction thereon which is not expressly stated in the charter' [Citations.] Thus, '[r]estrictions on a charter city's power may not be implied.' [Citation.]" (*Id.* at p. 171.) A city may not, however, act in conflict with its charter. "Any act that is violative of or not in compliance with the charter is void." (*Ibid.*)

Applying these principles of charter interpretation, we conclude that the mere failure of the Charter to expressly grant to the Commission the power to hear appeals of CRB reports does not prevent the Commission from hearing them. Further, granting the Commission this power does not conflict with the provisions of the Charter. Although the city manager establishes the rules governing the CRB, the power to establish rules governing the CRB is not the same as the power to hear appeals of CRB findings.

In this case Uberuaga, the city manager, is not the appropriate officer to conduct an administrative appeal, even though the CRB reports to him. Section 3304 requires, at a minimum, "that the officer be afforded an evidentiary hearing before a neutral fact finder." (*Giuffre v. Sparks* (1999) 76 Cal.App.4th 1322, 1329; see also *Stanton v. City of West Sacramento* (1991) 226 Cal.App.3d 1438, 1443 [administrative appeal to take place

" ' "before a reasonably impartial, noninvolved reviewer." ' "].) In *Gray v. City of Gustine* (1990) 224 Cal.App.3d 621, 631-632, the court held the city's proposed procedure for appeal was inadequate because the hearing was to be held before the city manager, who had instituted the punitive action. Similarly, Uberuaga instituted the punitive action in this case by publishing the CRB report. Therefore, he is not a neutral fact finder. In contrast, the Commission was not involved in the present controversy and so could be the neutral fact finder required by section 3304.

As we have discussed above, state law requires the City to offer officers an opportunity to appeal punitive actions. The Charter does not specifically provide for an appeal of CRB decisions. The Commission, however, already hears appeals of terminations, suspensions and demotions. Further, the Charter empowers the city council to add further duties to the Commission in order to allow it to carry out its mission. Therefore, the Commission is the appropriate body to conduct the administrative appeal required by state law. (See *Runyan v. Ellis* (1995) 40 Cal.App.4th 961, 967 [officer entitled to appeal before civil service commission "[g]iven the only existing apparatus in the city for an administrative appeal by police officers is found with the civil service commission"].)

We also reject the City's contention that an appeal before the Commission is useless because the Commission has no power over the CRB. The purpose of the administrative appeal is to give Keating and Wills the opportunity to show the CRB erred when it criticized their judgment and use of discretion so as to insure they will suffer no adverse effects from the CRB report. Should the Commission agree with Keating and

Wills, its decision should quell public concern and avert any adverse effects, such as an inability to transfer or to be promoted, which could arise from the CRB report.

We also reject the City's contention the Commission may not hear the appeal due to the provisions of the Memorandum of Understanding between the Police Officers Association and the City (MOU). The MOU provides that appeals of certain punitive actions take place before the Commission and appeals of lesser punitive actions take place within the police department. In this case, an appeal within the police department would not have the affect upon public opinion of an appeal before the Commission. The MOU also provides that "[a]ll provisions of this article are to be read to *expand* and/or complement rights which officers enjoy under the Public Safety Officer Procedural Bill of Rights." (Italics added.) The City's use of the MOU to restrict an officer's right to an appeal, then, violates the spirit and the letter of the MOU. Further, courts may scrutinize procedures established by an MOU "to determine whether they satisfy due process requirements and section 3304." (*Guiffre v. Sparks, supra*, 76 Cal.App.4th at p. 1331.)

For these reasons, we affirm the court's order that Keating and Wills be given an administrative appeal before the Commission.

III. *Sanctions*

We deny Petitioners' motion for sanctions under Code of Civil Procedure section 907. Code of Civil Procedure section 907 provides: "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." An appeal is frivolous "when it is prosecuted for an improper motive -- to harass the respondent or delay the effect of an adverse judgment

-- or when it indisputably has no merit -- when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 646.) There is no evidence the City had an improper motive in prosecuting this appeal, nor is the appeal "totally and completely without merit." Although the law as formulated in *Caloca* governs the issue of punitive action, this case is an extension of the facts *Caloca*. Further, *Caloca* does not reach the question of the proper place for an administrative appeal under the Charter.

DISPOSITION

The judgment is affirmed. Appellant to bear costs on appeal.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.